

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

WASHINGTON TOXICS COALITION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

Respondent.

NORTHWEST AQUATIC ECOSYSTEMS,  
AQUATCHNEX,

Respondents-Intervenors

SEATTLE YACHT CLUB, QUEEN CITY  
YACHT CLUB, MEYDENBAUER BAY  
YACHT CLUB, AND NEWPORT YACHT  
BASIN ASSOCIATION,

Intervenors

PCHB NOS. 06-011, 06-020, 06-  
022, 06-023

ORDER DENYING STAY

Washington Toxics Coalition has moved the Board for a stay of the effectiveness of the Aquatic Plant and Algae Management General Permit (Aquatic Plant Permit) pending a hearing and decision on the merits of the consolidated cases. The Aquatic Plant Permit was issued by the Washington Department of Ecology (Ecology) on March 1, 2006, and became effective on April 1, 2006. Applications for coverage under the permit have been made for treatment at a number of locations and notices have been posted indicating pesticides could be applied to sites on Lake

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023 (1)

1 Washington in the near future. The Aquatic Plant Permit has been challenged by the Washington  
2 Toxics Coalition, by aquatic management firms, Northwest Aquatic Ecosystems and  
3 Aquatechnex. The Seattle Yacht Club, Queen City Yacht Club, Meydenbauer Bay Yacht Club  
4 and Newport Yacht Basin Association (Yacht Clubs) have been granted status as intervenors in  
5 the proceeding based upon their interest in treating aquatic weeds on and around their properties.  
6 Ecology, Northwest Aquatics, Aquatechnex, and the Yacht Clubs oppose the Toxic Coalition's  
7 request for a stay.

8 The Board heard oral argument on the stay on May 17, 2006, in Lacey, Washington.  
9 Richard Smith represented the Toxics Coalition, Laura Watson represented Ecology, Douglas  
10 Dorling represented Northwest Aquatic Ecosystems, and James Tupper represented the Yacht  
11 Clubs. Aquatechnex did not participate in the oral arguments, but did submit written materials  
12 opposing the stay motion. The Board was comprised of William H. Lynch, Kathleen Mix, and  
13 Andrea McNamara Doyle. Administrative Appeals Judge, Phyllis Macleod, presided for the  
14 Board. The arguments were reported by Kim Otis of Gene Barker and Assoc., Olympia,  
15 Washington.

16 In ruling on the stay motion, the Board considered the following materials:

- 17 1. Washington Toxics Coalition Motion for Stay of Aquatic Plant and Algae  
18 Management General Permit.
- 19 2. Declaration of Richard Smith Supporting Motion to Stay with Exhibits.
- 20 3. Washington Toxics Coalition's Motion for Temporary Restraining Order.
- 21 4. Declaration of Diana Forman.

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023 (2)

5. Declaration of Erika Schreder.
6. Declaration of Richard Smith Supporting Washington Toxics Coalition's Motion for Temporary Restraining Order with Exhibits.
7. Ecology's Opposition to Petitioner's Motion for Temporary Restraining Order.
8. Declaration of Kelly McLain.
9. Aquatechnex Response to Motion for Temporary Restraining Order and Stay with Exhibits.
10. Declaration of Terry McNabb with Exhibits.
11. Declaration of Douglas Dorling.
12. Intervenors' Response in Opposition to Motion for Stay and Temporary Restraining Order.
13. Declaration of Clint Prescott.
14. Declaration of Don Hayes.
15. Declaration of Scott Grimm.
16. Petition to Intervene by Seattle Yacht Club, Queen City Yacht Club, Meydenbauer Yacht Club and Newport Yacht Basin Association with Exhibits.
17. Washington Toxics Coalition's Reply Supporting Motion for Temporary Restraining Order.
18. Declaration of Richard Smith Supporting WTC's Reply on Temporary Restraining Order.
19. Yacht Clubs' and Newport's Response in Opposition to Motion for Stay.

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023 (3)

20. Aquatechnex Reply to Motion for Temporary Restraining Order and Stay.
21. Ecology's Response in Opposition to Motion for Stay.
22. Declaration of Kelly McLain.
23. Washington Toxics Coalition's Reply Supporting Motion for Stay.
24. Declaration of Richard Smith Supporting WTC's Reply on Motion for Stay with Exhibits.
25. Excerpt from Ecology Website Addressing Fish Timing Windows in Aquatic Plant and Algae Management Permit.

During the oral argument, Kelly McLain of the Department of Ecology was sworn in as a witness to provide information in response to Board questions. Based upon the evidence submitted, the written material filed, and the arguments of counsel, the Board enters the following decision.

#### Factual Background

The challenged permit in this case is the Aquatic Plant and Algae Management General Permit issued by Ecology on March 1, 2006, with an effective date of April 1, 2006. The permit was issued under Ecology's state authority to issue waste discharge permits and under Ecology's delegated authority to issue National Pollutant Discharge Elimination System (NPDES) permits. The Aquatic Plant Permit replaces and revokes the Aquatic Nuisance Plant and Algae Control Permit. It also covers in-lake projects previously covered under the Aquatic Noxious Weed Control Permit. (Smith Declaration, Ex. A).

1 In prior years, certain pesticide applications for the treatment of noxious weeds were  
2 authorized through “extension” of NPDES permit coverage from the Washington State  
3 Department of Agriculture (WSDA) to individual applicators. In September 2004, the Toxics  
4 Coalition filed a Clean Water Act citizen suit against WSDA alleging that the practice of  
5 “extending” coverage to others violated the conditions of the Aquatic Noxious Weed Control  
6 NPDES Waste Discharge General Permit issued to it by Ecology and the Clean Water Act.  
7 (Declaration of Erika Schreder ¶5). The Coalition reached a settlement of that lawsuit with  
8 WSDA, and a consent decree was entered in September 2005 indicating WSDA would stop  
9 “extending coverage” under the noxious weeds NPDES permit to commercial pesticide  
10 applicators or to non-governmental organizations that are not acting in cooperation with or as  
11 part of a specific program that is coordinated, operated, or funded by Agriculture. (*Id.*) Even  
12 prior to entry of the order, the terms of the decree were observed during the summer of 2005, and  
13 the new approach significantly reduced treatment options. As a result of the settlement,  
14 approvals authorizing chemical treatment of noxious weeds during the 2005 treatment season  
15 were essentially eliminated. (Schreder Declaration, ¶5, 7).

16 The 2006 Aquatic Plant Permit in controversy in this case describes its scope as follows:

17 This general permit covers aquatic plant and algae management activities  
18 that discharge chemicals and other aquatic plant and algae control  
19 products into surface waters of the state of Washington. Products  
20 regulated under this permit include herbicides, algacides, adjuvants,  
21 marker dyes, barley straw, shading products, biological water clarifiers,  
and nutrient inactivation products. In-lake and roadside/ditch emergent  
vegetation management activities are also included where chemicals may  
enter the water.

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023 (5)

1 (Smith Declaration, Ex. A). Ecology took public comment on a draft of the Permit from  
2 December 7, 2005, through January 27, 2006. (Smith Declaration, Ex. C). The draft indicated  
3 the Permit was being issued under state waste discharge permitting authority. After receiving  
4 comments from interested citizens and groups, including Washington Toxics Coalition, Ecology  
5 decided to issue the permit as both a state waste discharge permit and an NPDES permit. (Smith  
6 Declaration, Ex. C, D). Ecology did not reopen the public comment period following the  
7 announcement that it would issue the permit under joint authority. Several general conditions  
8 were added to the permit in order to comply with NPDES requirements. (Kelly McLain  
9 Declaration ¶22). The Toxics Coalition contends this procedure deprived the public of the  
10 opportunity to comment on the draft as an NPDES permit.

11         The 2006 Aquatic Plants Permit establishes three methods of weed management. The  
12 first category provides for “eradication” of state-listed noxious weed species or weeds on the  
13 state Department of Agriculture’s quarantine list. Eradication involves the permanent removal of  
14 all non-native, invasive aquatic plants of one or more species within a water body or along a  
15 shoreline. (Smith Declaration, Ex. E, p. 11; McLain Declaration ¶6).

16         The second form of management addresses weed “control,” which involves the partial  
17 removal of aquatic plants within a water body or along a shoreline to allow for the protection of a  
18 water body’s beneficial uses. Control may include the removal of state-listed noxious weeds or  
19 allow for treatment of nuisance native aquatic plants. (Smith Declaration, Ex. E, p. 11; McLain  
20 Declaration ¶7).

21  
ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023                   (6)

1           The third method of weed management is identified as “nutrient inactivation” which  
2 involves changing sediment release characteristics in an effort to make the limiting nutrient (such  
3 as phosphorus) less available in the lake water. The goal is to keep algae production at a  
4 manageable level during peak recreation seasons. (Smith Declaration, Ex. E, p. 11; McLain  
5 Declaration ¶8).

6           Ecology extensively reviewed each herbicide allowed for use under the Aquatic Plant  
7 Permit, specifically researching environmental impacts and human health risks, as well as any  
8 impacts to threatened or endangered species. Herbicides are also required to undergo the federal  
9 registration process and be reviewed by WSDA prior to being used in Washington. In addition  
10 to Agriculture’s approval, Ecology has completed detailed risk assessments and environmental  
11 impact statements for each pesticide. Mitigation measures have been included in the permit to  
12 protect fish, wildlife, and rare aquatic species. Ecology has concluded there is no likelihood of  
13 harm to eco-systems, aquatic life, or human health from approved product applications as long as  
14 the federal label and all permit conditions are followed. (McLain ¶14).

15           Washington Toxics Coalition contends its members will be negatively impacted by  
16 pesticide discharges to Lake Washington, Portage Bay, and other waters if chemical treatments  
17 are allowed under the Aquatic Plant and Algae Permit. The WTC campaign, “Clean Water for  
18 Salmon,” seeks to safeguard Washington’s water quality for the benefit of diminished salmon  
19 populations. Reducing pesticide applications in favor of alternative means of weed control is a  
20 major element of the campaign. (Declaration of Erika Schreder ¶4, ¶6). WTC contends that if  
21 the Board does not grant a stay, effectively stopping pesticide applications for the control of

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023           (7)

1 noxious weeds, irreparable harm will occur. However, no specific harms to identified species  
2 are demonstrated by WTC's evidence, which is primarily contained in the general testimony  
3 submitted by Erika Schreder. In contrast, Ecology has presented countervailing testimony  
4 regarding the anticipated impacts of 2,4-D, diquat, and endothall.

5       Additionally, the record contains substantial evidence that failure to treat noxious weeds  
6 can be detrimental to waters of the state, causing harm to the health of those using the waters as  
7 well as to other beneficial uses of the waters. Noxious weeds have been characterized as  
8 growing "voraciously" if left unchecked. Weed mats often develop in the absence of control  
9 methods and such mats create safety issues for swimmers and boaters. The Yacht Clubs have  
10 submitted evidence indicating excessive weeds exist near their facilities and present a hazard to  
11 extensive youth boating programs offered during the summer months. Motor boats navigating  
12 near marinas have experienced loss of steering ability and engine damage when their propellers  
13 become entangled in thick weeds. (Grimm Declaration ¶5, 6; Prescott Declaration ¶5).

14       Noxious weeds can also be extremely harmful to Washington's lake eco-systems.  
15 Ecology indicates that on a statewide basis, noxious weeds have negatively impacted power  
16 generation, water supply and irrigation, caused fishery degradation, and reduced native plant  
17 biodiversity, often resulting in loss of suitable habitat for fish and wildlife. Invasive plants  
18 displace native species that provide good fish and wildlife habitat and replace it with  
19 monocultures, reducing biodiversity of the ecosystem. Invertebrates are an important food  
20 source for many fish species, and some invertebrates are killed by the presence of Eurasian  
21 watermilfoil. (See, Declaration of Kelly McLain, ¶9-10).

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023                   (8)



1           The evidence before the Board establishes that non-chemical methods for treating  
2 noxious weeds are less effective and more costly than chemical controls in some locations.  
3 Areas around marinas are particularly difficult to treat using non-chemical methods because  
4 heavy boat traffic presents a hazard to divers, and mechanical harvesters have trouble navigating  
5 in the limited space available between docks. Cutting and harvesting also create fragments,  
6 which are a primary reproductive method for two of the most prevalent weeds, Brazilian elodea  
7 and Eurasian watermilfoil. Mechanical harvesters also capture and kill small fish, invertebrates,  
8 and amphibians. (McLain Declaration ¶11).

9           Timing is an important aspect of using chemical control methods of weed management  
10 successfully. Brazilian elodea, in particular, is more effectively treated if treatment begins early  
11 in the season. (McLain Declaration ¶12). Timing chemical treatments is also a key strategy to  
12 protect fish species present in affected waters under the Aquatic Plant Permit. Detailed “fish  
13 windows,” limiting chemical applications to identified time periods, have been established for  
14 many water bodies throughout the state, including Lake Washington. (Smith Declaration, Ex. E,  
15 p. 19). The Washington Department of Fish and Wildlife, as well as National Marine Fisheries  
16 Service and the United States Fish and Wildlife Service, were involved in establishing the fish  
17 windows for this permit. Applicable fish window restrictions are explicitly included in each  
18 permit coverage approval granted by Ecology. (Testimony of Kelly McLain).

19           Ecology contends that if a stay of the Aquatic Plant Permit is granted, many in-lake  
20 eradication projects statewide would be severely impaired by the unavailability of chemical  
21

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023           (9)

1 treatment options. (McLain Declaration ¶15). The Yacht Clubs also have serious concerns  
2 about the consequences of a stay effectively prohibiting chemical treatments for the 2006 season.

3 Analysis

4 The Board's rules address the required showing for a stay at WAC 371-08-415(4):

5 (4) The requester makes a prima facie case for a stay if the  
6 requester demonstrates either a likelihood of success on the merits of the  
7 appeal or irreparable harm. Upon such a showing, the board shall grant  
8 the stay unless the agency demonstrates either:

9 (a) A substantial probability of success on the merits; or

10 (b) Likelihood of success and an overriding public interest which  
11 justifies denial of the stay.

12 Likelihood of Success

13 The Board examined the meaning of the "likelihood of success on the merits" criteria for  
14 a stay in *Airport Communities Coalition v. Ecology*, PCHB No. 01-160 (Order Granting Motion  
15 to Stay Effectiveness of Section 401 Certification)(December 17, 2001):

16 Likelihood of success on the merits means one or both sides have presented the  
17 Board with justiciable arguments for and against a particular proposition. Likelihood of  
18 success on the merits is not a pure probability standard under RCW 43.21B.320 and  
19 WAC 371-08-415(4). This standard does not require the moving party to demonstrate it  
20 will conclusively win on the merits, but only that there are questions 'so serious as to  
21 make them fair ground for litigation and thus more deliberative investigation.' The  
evaluation of the likely outcome on the merits is based on a sliding scale that balances the  
comparative injuries that the parties and non-parties may suffer if a stay is granted or  
denied. For example, where the non-moving party will incur little or no harm or injury if  
a stay is granted, then the moving party's demonstration of likelihood of success need not  
be as strong as where the moving party would suffer great injury.

(Citations omitted.)

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023 (10)

1 In this case, the Toxics Coalition has the burden of establishing the grounds for issuance  
2 of a stay. The Coalition suggests it has a likelihood of success on the merits of its appeal based  
3 on several legal theories. The Coalition's initial argument contends the Aquatic Plant Permit is  
4 inconsistent with the detailed regulatory requirements for obtaining a short-term modification of  
5 water quality standards including: (1) the requirement to determine a modification is necessary  
6 to accommodate essential activities, respond to emergencies, or otherwise protect the public  
7 interest, (2) the requirements governing the length of a short-term violation, and (3) the citation  
8 of WAC 173-201A-410 as authority for short-term water quality modifications, rather than the  
9 currently applicable WAC 173-201A-110.<sup>1</sup> The responding parties dispute these contentions.

10 The Coalition also alleges a likelihood of success on the merits of its argument that the  
11 Aquatic Plant Permit improperly allows coverage to be accomplished in less than sixty days.  
12 The respondents interpret the Permit differently, and dispute this point. The Coalition claims a  
13 likelihood of success based on its argument that the noncompliance notification provisions of the  
14 Aquatic Plant Permit are inconsistent with federal delegation requirements because they are not  
15 as stringent as the federal standards. The respondents assert the Aquatic Plant Permit actually  
16 has more stringent notification requirements for violations than the federal provisions.

17 Ecology's decision to issue the Aquatic Plant Permit as both a waste discharge permit and  
18 an NPDES permit forms the basis for additional challenges: (1) Ecology failed to observe the  
19 procedural requirements for notice and comment applicable to an NPDES permit, (2) Ecology

---

20 <sup>1</sup> Ecology adopted new state surface water quality standards in 2003, however, several portions of those standards  
21 (including the provisions regulating short-term modifications) have not yet been approved by the U.S.  
Environmental Protection Agency, and thus are not currently applicable to NPDES permits.

1 made reference to the inapplicable 2003 version of the state water quality standards, and (3)  
2 Ecology failed to forward a copy of the draft Permit to required federal agencies. The  
3 respondents dispute these challenges.

4       The Board's procedural rules and the cases discussing them recognize that a likelihood of  
5 success on the merits for purposes of a stay is less than a pure probability of success. The  
6 moving party is only required to present the Board with justiciable arguments for and against a  
7 particular proposition. The standard in WAC 371-08-415(4) does not require the moving party  
8 to demonstrate it will conclusively win on the merits, but only that there are questions so serious  
9 as to make them fair ground for litigation and thus more deliberative investigation. While the  
10 record on this stay does not convince the Board the Toxics Coalition will prevail on the merits of  
11 the arguments presented, the showing meets the standard in WAC 371-08-415(4) of raising  
12 justiciable issues with serious questions worthy of litigation.

### 13 Irreparable Harm

14       The Toxics Coalition also argues that it has shown irreparable harm will occur if a stay of  
15 the Aquatic Plant Permit is not granted while this proceeding is pending. After reviewing the  
16 evidence of harm presented by the Coalition, as well as the countering evidence presented by the  
17 responding parties, the Board is not convinced irreparable harm will occur if a stay is not  
18 granted. The Coalition's argument that any short-term modification of water quality standards  
19 constitutes per se irreparable harm is not persuasive. The evidence submitted in support of the  
20 stay did not show actual harm to beneficial uses. Accordingly, the second criterion for granting a  
21 stay has not been established. Nevertheless, based upon the Toxic Coalition's showing of a

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023                   (12)

1 likelihood of success on the merits of the case, a stay would properly issue unless Ecology  
2 demonstrates either a substantial probability of success on the merits or likelihood of success and  
3 an overriding public interest which justifies denial of the stay. (WAC 371-08-415(4)(b)).

4 Agency Showing

5         In this instance, Ecology has shown likelihood of success on the merits of the case  
6 coupled with an overriding public interest justifying denial of the stay. The Department's  
7 evidence reveals that the development of the Aquatic Plant Permit was a deliberate process with  
8 thorough research and analysis supporting the agency's decisions. Many of the challenges raised  
9 by the Toxics Coalition are focused on procedural issues, rather than the substance of the permit  
10 requirements and the resulting level of impact on the environment. Based on the evidence before  
11 the Board on this motion, Ecology has certainly met the standard of raising justiciable issues  
12 substantiating the validity of the Aquatic Plant Permit.

13         In addition, Ecology has shown a strong public interest in denying a stay of the Aquatic  
14 Plant Permit's implementation. Ecology has demonstrated that the public interest surrounding  
15 the issue of aquatic plant management is complex. Rather than simply elevating recreational  
16 interests over all other beneficial uses, as alleged by the Coalition, the Aquatic Plant Permit  
17 attempts to recognize and address the diverse, and sometimes conflicting, interests at stake in  
18 using chemical methods to control aquatic weeds. Ecology has attempted to minimize chemical  
19 applications, while providing an avenue for carefully controlled use of pesticides, if necessary to  
20 effectively control weeds on a particular site. Potential harm to fish was analyzed by state and  
21 federal resource agencies and the resulting "fish windows" prohibit chemical applications that

ORDER DENYING STAY

PCHB NOS. 06-011, 020, 022, 023                   (13)

1 would damage fish. The fish windows are specifically incorporated into permit coverage  
2 approvals issued by Ecology.

3       The responding parties have pointed to a number of harms that would result if chemical  
4 treatment is once again removed from the list of possible methods for addressing aquatic weed  
5 infestations. Safety concerns for swimmers, boaters, youth sailing programs, and pets, have been  
6 identified. Interference with irrigation programs and economic interests can also be anticipated  
7 if reasonable weed control methods are foreclosed. Damage to the aquatic ecosystem would be a  
8 particularly critical result of allowing uncontrolled aquatic weed growth throughout the state.  
9 Creation of a monoculture environment and the attendant damage to fish and the invertebrates in  
10 their food chain presents a serious threat to the public interest. The Legislature has  
11 acknowledged the need to address noxious weeds in the aquatic environment and has directed  
12 Ecology to facilitate reasonable control of infestations. RCW 90.48.455. Issuing a stay of the  
13 Aquatic Plant Permit would frustrate this legislative directive and place public safety at some  
14 risk. Accordingly, the Board concludes Ecology has met the standard in WAC 371-08-415(4)(b)  
15 by showing a likelihood of success on the merits of the case and an overriding public interest  
16 justifying denial of the stay. Based on the foregoing analysis the Board enters the following:

1 ORDER

2 The Appellant's motion for a stay of the Aquatic Plant Permit pending a decision in this  
3 appeal is hereby DENIED.

4 Dated this 6<sup>th</sup> day of June 2006.

5 POLLUTION CONTROL HEARINGS BOARD

6 WILLIAM H. LYNCH, CHAIR

7 KATHLEEN MIX, MEMBER

8 ANDREA MCNAMARA DOYLE, MEMBER

9 Phyllis K. Macleod  
10 Administrative Appeals Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21